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Supreme Court of the United States

OCTOBER TERM, 1954

No. 390

CLAIR LAVERNE WHITE,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Southern District of California, Central Division, convicting the petitioner of a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It appears as Appendix A to this petition. No opinion was written by the district court. The opinion by the Court of Appeals in the companion case of *United States* v. *Tomlinson* is an appendix to the petition in that case that accompanies this one.

JURISDICTION

The judgment of the Court of Appeals was entered on September 14, 1954. (See Appendix B to this petition.) The time for filing this petition for writ of certiorari expires on October 14, 1954. This petition for writ of certiorari is filed within time. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure. Title 18, Section 3231, United States Code, confers jurisdiction on the trial court.

QUESTIONS PRESENTED AND HOW RAISED

I.

The undisputed evidence showed that petitioner possessed conscientious objections to participation in both combatant and noncombatant military service. He showed that these objections were based on his sincere belief in the Supreme Being. He showed that his obligations to the Supreme Being were superior to those owed to the Government. The file showed that his beliefs were not the results of political, philosophical, or sociological views but that they were based solely on the Word of God. (15-20)[1]

The local board classified White as a conscientious objector liable for performance of noncombatant military service in the armed forces. (12) On a hearing before the

[1] Figures appearing in parentheses refer to pages of the draft board file, Government's Exhibit No. 1. The pages are numbered in longhand at the bottom and the numbers are circled.

board the I-A-O classification was continued. (12) There was no evidence in the file showing that White was willing to do noncombatant military service as a conscientious objector.

The case was referred to the Department of Justice for appropriate inquiry and hearing. The secret investigative report was favorable to the claim of White. The hearing officer found that White "would not assist in any material way." (42) The hearing officer found White to be sincere but recommended that he be ordered to do noncombatant service. (43) The appeal board classified White in Class I-A-O. He was made liable for noncombatant military training and service in the armed forces. (12, 39)

In the motion for judgment of acquittal it was contended that the denial of the conscientious objector and the recommendation of the hearing officer of the Department of Justice were without basis in fact, arbitrary, capricious and contrary to law. [I 19][2]

In the motion for new trial it was complained that the court erred in denying the motion for judgment of acquittal. [I 25]

The question presented here, therefore, is whether the denial of claim for classification by the appeal board and also the recommendation by the Department of Justice were arbitrary, capricious and without basis in fact.

II.

Petitioner's case was referred to the Department of Justice for appropriate inquiry and hearing. Following a secret investigation by the FBI a report was made to the hearing officer of the Department of Justice. White was

[2] Numbers appearing herein within brackets preceded by a Roman numeral I refer to the pages of the typewritten transcript of the record filed by the clerk of the United States District Court; when preceded by Roman numeral II the figures appearing within brackets refer to the stenographer's transcript of the proceedings at the trial.

called before the hearing officer for a hearing. He asked the hearing officer if there was anything unfavorable in the secret investigative report of the FBI. The hearing officer said there was no unfavorable evidence in the report. [II 40]

At the trial White caused to be subpoenaed the secret investigative report made by the FBI. A motion to quash was made by the Government and denied. [II 22] The hearing officer had the secret investigative report of the FBI before him. [II 38] The FBI report was marked for identification. [I 15-16; II 44-45, 46, 47]

Petitioner moved that the FBI report be put into evidence. The motion was denied. [I 16; II 45] The trial court inspected the secret investigative report. He found from an investigation and examination that it was material on whether the hearing officer had stated the truth when he said that there was no unfavorable evidence in the report. [II 47-48]

The trial court excluded the FBI report from evidence under the authority of Order No. 3229 of the Attorney General. [II 48]

In the motion for judgment of acquittal it was contended that petitioner had been deprived of his rights to due process of law by failure of the court to compel the production of the secret investigative reports at the trial. [I 21] In the motion for new trial complaint was made of the error of the court in not receiving into evidence and not allowing petitioner to examine the secret investigative report of the FBI for the purpose of determining whether or not there had been a fair and adequate summary made of the adverse evidence upon the occasion of the hearing before the hearing officer. [I 25-26]

The question presented here, therefore, is whether the trial court committed reversible error when it excluded from evidence the secret investigative report of the FBI and denied petitioner the right to have the report produced for the purpose of determining whether or not a fair and ade-

quate summary of the adverse information appearing in the report was given by the hearing officer to petitioner.

STATUTES AND REGULATIONS INVOLVED

The Universal Military Training and Service Act, 62 Stat. 604, 612, 622; 65 Stat. 75, 86, particularly Section 6(j), 50 U. S. C. App., Supp. V, § 456(j) is involved. Also involved are the Selective Service Regulations. Specific consideration must be given to Sections 1622.14, 1624.2(b), 1625.2, 1626.24(b), 1626.25 and 1626.26 (32 C. F. R. §§ 1622.14, 1624.2(b), 1625.2, 1626.24(b), 1626.25 and 1626.26). The pertinent portions of the statute and the regulations are lengthy. They are printed as Appendix C to this petition at pages 35 to 41.

STATEMENT OF THE CASE

The Facts

Clair Laverne White was born July 13, 1931. (1) He registered with his local board in Los Angeles on July 14, 1949. (2, 3) He was mailed a classification questionnaire on October 20, 1950. (3, 5) He filled out this questionnaire properly and filed it with the local board on November 9, 1950. (4, 5)

The name and address of the petitioner were shown in the questionnaire. (6) In Series VI he answered that he was a minister of religion. He stated that he customarily and regularly served as such. He added that he was a minister of Jehovah's Witnesses. (7)

He stated that he was also a punch press operator employed by the North Hollywood Tool and Manufacturing Company. (8) He worked 48 hours per week and made $1.20 per hour at this job. (9) He signed the conscientious objector blank under Series XIV. (11)

The local board mailed to White a special form for conscientious objector on November 13, 1950. (12, 15)

White filled out the form and returned it to the local board on November 20, 1950. (15)

He signed Series I (B) in the special form for conscientious objector. By so doing he certified that he was conscientiously opposed to both combatant and noncombatant military service. He answered that he believed in the Supreme Being. He described the nature of his beliefs that involved duties which were superior to those owed to the state. He said that he was obliged to render "pure and undefiled worship of the most high God. Yes, I must obey God in all things." (15)

He cited several scriptures supporting his stand as a conscientious objector. He stated that he got his belief from his parents. He showed that since childhood they had taught him the beliefs of Jehovah's Witnesses found in the Bible. (16) He stated that he relied upon his father for religious guidance. (16)

He answered that he did not believe in the use of force under any circumstances. (16) Studying the Scriptures and telling others what he believed as a minister, he stated, demonstrated his depth of conviction and consistency of belief. He said that he gave public expression at every opportunity concerning his belief in the Almighty God. (16)

He listed the schools that he had attended, his employers and his places of residence. (13, 16) He gave the name and address of his parents and showed that they were Jehovah's Witnesses. (9, 13) He showed that he was not a member of any military organization but that he was a member of a religious organization. (19) He said that he was one of Jehovah's Witnesses and that the Watchtower Bible and Tract Society was the legal governing body of that organization. (19) He showed that he had become a member by being baptized on August 24, 1941, at Titusville, Pennsylvania (19) He gave the address of the church and listed, as the presiding minister, Frank Pisel.

He described the belief of Jehovah's Witnesses in respect to bearing arms. He said that they objected and he

objected because "we obey the laws of the land only as long as they do not conflict with God's laws." He then quoted Acts 5:29 as follows: "We ought to obey God rather than men." (19) He then gave a list of names for references. (20) He signed the conscientious objector form at the end. (20)

On January 15, 1951, the local board classified White in Class I-A-O. This classification made him liable for noncombatant military service in the armed forces. (12) He was notified of this classification. (12) He wrote a letter to the board requesting a personal appearance. (12, 23) The local board notified him to appear before it on January 29, 1951. (12) He appeared for personal appearance at the time and place fixed by the board. (22)

A short memorandum was made of the personal appearance by the local board. (22) After the hearing was over the board concluded not to reopen his case. White was continued in Class I-A-O. (12) The local board, however, noted that the case was reopened "automatically on appearance." (24) In the minutes it is stated that White was "in defense work—case not reopened. Continued I-A-O." (12)

On January 30, 1951, White's mother wrote a letter to the local board stating in detail his beliefs as one of Jehovah's Witnesses and emphasizing his stand as a conscientious objector. She requested that he be classified as a minister. (25-27)

On February 7, 1951, White wrote a letter of appeal to the board. He argued his conscientious objector stand and stated that he was neutral to the wars between the nations. (28-30) The local board notified him to appear for a physical examination. (31) On March 1, 1951, he wrote a letter to the board and sent in affidavits corroborating his stand as a conscientious objector and minister. (32-35)

The report of the physical examination was received by the board. On March 16, 1951, the local board notified White of his physical acceptability for service in the armed

forces. (37) The appeal board reviewed the file on April 11, 1951, and made a preliminary determination that White was not entitled to the conscientious objector classification. This order caused the file to be referred to the Department of Justice for appropriate inquiry and hearing. (12) The file was on that date forwarded to the Department of Justice. (38)

After an extensive investigation by the FBI a secret report was made. This report of the investigation was forwarded to the hearing officer. [II 38]

White was notified on February 6, 1952, to appear before the hearing officer for a hearing on March 6, 1952. (41) He appeared. The hearing officer asked him some questions. White told the hearing officer that none of his brothers and sisters went into the army. [II 39] He showed him that he had been one of Jehovah's Witnesses since he was three years old. [II 39] He testified that he went to church three times a week. He told the hearing officer that he would not kill, even if the Russians came into this country and killed his parents. He stated that he would trust in the power of Almighty God to resurrect his parents if they were killed. [II 39-40]

He stated that he would not do work of any national importance and would not help in the war effort in any manner. [II 40] He asked the hearing officer if there was any unfavorable evidence and the hearing officer replied that there was not any unfavorable evidence in the FBI report. [II 40] At the close of the hearing the hearing officer told him not to worry about his claim for classification as a conscientious objector. [II 41]

The hearing officer then made a report to the Department of Justice. He found that White worked in a machine shop making tools and dies. He also found that White worked on war contracts from 1949 to 1951. He said that White had been brought up in the faith of Jehovah's Witnesses and that he insisted his conscientious objections were predicated on religious training and belief. He found that White went

to church two or three times a week. He also said that White preferred to go to prison rather than go to the army. The hearing officer said: "It is quite obvious that these people are rather fanatical in their beliefs. Statements were made that they would not assist in any material way, but only spiritually in case of necessity." (42)

The hearing officer concluded that there "is no question in my mind but that the registrant is sincere, but from all of the evidence I would recommend that he be placed in noncombatant service, or I-A-O." (43)

The Attorney General followed the recommendation of the hearing officer and wrote the appeal board that White should be classified in Class I-A-O. (44) On May 13, 1952, the appeal board classified White in Class I-A-O. (12, 39) On May 19, 1952, the file was returned to the local board and White was notified of the classification. (12)

On May 29, 1952, White wrote a letter of appeal to the National Director. He requested that the National Director appeal his case to the President. This letter, dated May 27, 1952, was filed with the board on the 29th. (12)

The local board reviewed the file on June 9, 1952, and determined to take no action. (12) Petitioner was ordered to report for induction on July 7, 1952. (12, 47) He did not report. The local board wrote him a letter to report within five days after July 11, 1952. (49) By letter on July 14, 1952, the board ordered him to report for induction on July 18, 1952. (49) White reported on July 18, 1952, and refused to submit to induction. (50) He signed a statement that he refused to be inducted. (52)

Form and History of Action Showing Jurisdiction in Courts Below

The indictment charged the petitioner with a violation of the Universal Military Training and Service Act. It was alleged that after registration and final classification the petitioner was ordered to report for induction. It is then

alleged that he "knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do." [I 2-3] Petitioner was arraigned and pleaded not guilty. [I 4] Trial by jury was waived and he consented to trial by the court. [I 6]

The secret investigative FBI report was subpoenaed. The Government made a motion to quash the subpoena. The court overruled the motion.

The case was called for trial and evidence was heard. [II 1-58] A motion for judgment of acquittal was made at the close of the evidence. [I 17-21] The motion was denied. [I 23; II 53] The court found the petitioner guilty as charged. [I 23; II 53] A motion for new trial was filed. [I 25-26] The motion for new trial was denied. [I 27; II 55] The court sentenced petitioner to four years in the custody of the Attorney General. [I 27-28; II 58] Notice of appeal was duly and timely filed. [I 29] The transcript of the record including statement of points relied on was filed in the court below.

REASONS FOR GRANTING THE WRIT

I.

The court below has decided that the rule of *Dickinson* v. *United States,* 346 U. S. 389 (Nov. 30, 1953), does not apply in determining whether there is basis in fact for the denial of the conscientious objector status to petitioner. This is in direct conflict with decisions of other courts of appeals on the same question. The court below said:

"... The argument appears to add up to the proposition that since the appellant stated in his questionnaire and in letters addressed to the boards that he was conscientiously opposed not only to combatant service but to noncombatant service as well, and since these statements were supported by letters from his mother and his minister, the selective service boards were obliged to make findings in accordance

with his claims, in the absence of other affirmative evidence which contradicted his representations. This argument relies upon *Dickinson* v. *United States*, 346 U. S. 389, and appellant's position is that the rule of that case must be applied here.

"We think that the facts of this case do not call for any such conclusion. . . ."—See Appendix A, below, page 22.

The court, in order to reach the above conclusion, reviewed the religious belief of the petitioner (which is the same belief of conscientious objection stated by all of Jehovah's Witnesses). The religious belief was called an "attitude and demeanor" by the court below on an alien theory. It is that petitioner repeated orally what he had stated in writing which makes it an "attitude and demeanor." The court then proceeds to the conclusion, because it had miraculously transformed the religious belief into an "attitude and demeanor" through its semantics, that it was a fact question for the boards.

The court below then said: "We therefore conclude that the situation present here is very different than that present in the *Dickinson* case."—See Appendix A, below, page 26.

The above-described ruling of the court is a chiseling away completely from conscientious cases of the "no basis in fact" rule stated in *Estep* v. *United States*, 327 U. S. 114, 122 (1946). The sophistry of the court below did not avoid a direct conflict with many recent holdings of other courts of appeals in conscientious objector cases. (*Jewell* v. *United States*, 6th Cir., Dec. 22, 1953, 208 F. 2d 770; *Taffs* v. *United States*, 8th Cir., Dec. 7, 1953, 208 F 2d 329; *Weaver* v. *United States*, 8th Cir., Feb. 19, 1954, 210 F. 2d 815; *United States* v. *Hartman*, 2d Cir., Jan. 8, 1954, 209 F. 2d 366; *Pine* v. *United States*, 4th Cir., April 5, 1954, 212 F. 2d 93; *Jessen* v. *United States*, 10th Cir., May 7, 1954, 212 F. 2d 897; *United States* v. *Wilson*, 7th Cir., July 15, 1954, — F. 2d —) In these cases the identical religious belief of others of Jehovah's Witnesses (characterized by the court below

as an "attitude and demeanor") was stated. There, on the same facts, each of those courts held that there was no basis in fact for the denial of the conscientious objector status. Those courts held that the rule of *Dickinson* v. *United States,* 346 U. S. 389 (Nov. 30, 1953), did apply. Those holdings are in direct conflict with that of the court below.

The unsuccessful effort of the court below to hide the inherent conflict by characterizing the religious belief of petitioner as an "attitude and belief" can be demonstrated by an analogy. It is the same as a lawyer stating the facts and law of his case in a brief. This would be analogous to the papers in the draft board file. Then when the lawyer makes the argument orally the court characterizes the law and facts presented as an "attitude and demeanor." Such characterization would not support a rejection of the law and the facts by the court. So, as in the analogy, the court below cannot paint over the black and white record that brought the petitioner squarely within the statute. There is no basis in fact for the denial of the conscientious objector status by the draft boards as held by the court below. There is, therefore, a direct conflict between the holding of the court below and the holdings on the same question by other courts of appeals. For this reason the writ should be granted.

II.

Should the Court find no conflict between the holding of the court below and the decisions by other courts of appeals above cited, then petitioner says that there is an important question of federal criminal procedural law in the prosecution of draft law violations presented here that has not been decided by this Court, but which ought to be determined by it. It is whether a federal court can characterize a *bona fide* religious belief as a "demeanor and attitude" and by a false and sophisticated process of deduction conclude that a fact question is presented to a draft board when

there is no dispute in the evidence before the board and the board has not found want of credibility on the part of the registrant.

Should the process employed by the court below be approved then it will mean that none of Jehovah's Witnesses may be considered to be conscientious objectors because they all have—and when called upon at personal appearances before draft boards will state—the same religious belief. It is the same as that stated by petitioner. Surely Congress did not intend to permit the federal courts by the use of that vague term "attitude and demeanor" to resort to such unfair penalties and unreasonable forfeitures against a religious minority. Congress intended that the Federal courts should employ the same judicial process (determining whether there is or is not basis in fact for a draft board classification in a conscientious objector's case) as must be employed in cases involving ministers, congressmen, judges and other deferrred persons under the act. An important question of whether the rule of *Dickinson* v. *United States,* 346 U. S. 389 (Nov. 30, 1954), applies here should be determined by this Court. It has not yet been determined by this Court. The writ should be granted to do it.

III.

The court below held that because White worked for Douglas Aircraft at one time during the progress of his case through the draft boards such was basis in fact for denial of the conscientious objector status. See the opinion, below at paes 24-25. While the evidence did not show that petitioner actually did war work, the record did establish that his employer, Douglas Aircraft, was employed in making weapons of warfare. Without debating whether there was evidence that petitioner did war work, it is submitted that the performance of civilian work in a war plant is not equivalent to agreeing to do noncombatant military service.

A registrant may be opposed to noncombatant military

service and still be a conscientious objector thereto even though he is willing to do defense work or war work as a civilian. All the act deals with is the performance of military service. (*Taffs* v. *United States,* 8th Cir., Dec. 7, 1953, 208 F. 2d 329; *United States* v. *Hartman,* 2d Cir., Jan. 8, 1954, 209 F. 2d 366; *Jessen* v. *United States,* 10th Cir., May 7, 1954, 212 F. 2d 897) Nothing is said by Congress about the loss of conscientious objector status because of willingness to do war work as a civilian. It is rank judicial legislation for the court below to impute such an intent to Congress. It cannot be read into the act.

The holding of the court below on this point is in direct conflict with that of the Court of Appeals for the Seventh Circuit in *United States* v. *Wilson,* 7th Cir., July 15, 1954, — F. 2d —. There the court said: "It would be wholly unrealistic to construe this language to mean that a person whose civilian employment indirectly contributed to the war effort could not, therefore, meet the statutory test for exemption. Such a construction of the Act would completely nullify the provisions granting exemption to conscientious objectors, for it is difficult to conceive of any gainful activity which, in periods of extensive mobilization and training, would not in some manner aid the common purpose. Moreover, the Act expressly recognizes that one may engage in civilian work contributing to the national welfare without thereby losing the right to be classified as a conscientious objector. Section 6(j) provides that persons conscientiously opposed to noncombatant service in the armed forces shall be ordered to perform 'such civilian work contributing to the maintenance of the national health, safety, or interest' as may be considered appropriate by the local board. It is perfectly clear in this case that the nature of the defendant's civilian occupation could not be a basis in fact for denying him the status of a conscientious objector."

This patent conflict between the holding below and that in the *Wilson* case requires the granting of the writ.

IV.

The court below held that the religious belief of the petitioner, which opposed civilian service as a conscientious objector as well as military service as a conscientious objector, constituted basis in fact for the denial of the conscientious objector. See the opinion below at pages 23-25. This holding is in direct conflict with *Jewell* v. *United States*, 6th Cir., Dec. 22, 1953, 208 F. 2d 770, where the same argument was made by the Government and rejected.

The draft boards are not the enforcement or penalizing agencies of the Government under the act. This is vested in the United States District Courts. The boards must give proper classifications based on the records made before them. When the record in a case shows that a man is conscientiously opposed to military service this leaves only one pigeonhole under the law in which to put him, regardless of whether he objects to the work of a conscientious objector prescribed by law. The boards must classify such objector as a conscientious objector. He must be given the I-O classification. This classification makes him liable for civilian work in the national interest and safety. If he opposes such work and refuses to comply with an order to do such work he may be prosecuted for failing to obey this order. It is not the prerogative of the boards to take away the conscientious objector status, classify the registrant liable for military service, order him to do such service and then prosecute him for failure to do such service. Such a course would make meaningless the law requiring the boards to give proper classifications. It would be a usurpation of the enforcement powers of the courts and taking on penalizing powers by the board contrary to the act. It is obvious that the holding of the court below not only presents a conflict with *Jewell* v. *United States,* 6th Cir., Dec. 22, 1953, 208 F. 2d 770, but it also presents an important question in the administration of the draft law that has not been, but which should be, decided by this Court.

V.

The court below held that the I-A-O classification was proper and consequently was not arbitrary and capricious. See Appendix A, below, pages 25-26. This holding was made in spite of the fact that the record showed petitioner was not willing to perform noncombatant military service. The undisputed evidence showed that he was conscientiously opposed to the performance of noncombatant military service. It was entirely illegal for the draft boards to compromise his full claim and give him a classification that held that he was not opposed to, but liable for, the performance of such noncombatant training and service. This point has been more fully discussed in the petition for writ of certiorari in the companion case of *Tomlinson* v. *United States,* which petition accompanies this one in distribution to the Court. See pages 16-17 of that petition.

Therefore there is presented an important question of federal administrative law which has not been decided, but which should be determined by this Court. This is a good reason for granting this petition.

VI.

The court below held that there was a basis in fact for the appeal board classification because the local board had denied petitioner his conscientious objector status. See pages 22, 25, 26-27, Appendix A, below. This holding flies in the face of the act and regulations that provide that the appeal board determination shall be *de novo.* See 50 U. S. C. §460(b)(3). (*Reed* v. *United States,* 9th Cir., 205 F. 2d 216) Section 1626.24(b) of the regulations provides: "In reviewing the appeal, the appeal board shall not receive or consider any information which is not contained in the record received from the local board except (1) the advisory recommendation from the Department of Justice under section 1626.25, and (2) general information concerning economic, industrial, and social conditions." Section 1626.26 of the re-

gulations (32 C. F. R. § 1626.26) provides that the appeal board shall classify "giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant."

The holding below on this point is based on the fact that the local board is presumed to have based the classification on his "manner and demeanor" and that the "manner and demeanor" of petitioner was not that of a conscientious objector. Neither the memorandum made by the local board on the personal appearance nor the report of the hearing officer of the Department of Justice is based upon petitioner's "manner and demeanor." Nowhere in either of such papers is any such term or its equivalent found. Neither found that the credibility of petitioner was questioned. The holding that there was an implied adverse finding because of "manner and demeanor" is based on the religious beliefs of petitioner and not on his conduct at either hearing before the board or the Department of Justice.

The important question presented by this holding is whether a federal court can speculate and presume that an adverse finding was based on "manner and demeanor" when nowhere in the record of the personal hearings in the draft boards does it appear that "manner and demeanor" were questioned or relied upon for an adverse classification. The speculative holding of the court below is in direct conflict with *Dickinson* v. *United States,* 346 U. S. 389 (Nov. 30, 1953), where this Court held that federal judges could not speculate. The question is, moreover, an important question of federal administrative law which has not been, but which should be, decided by this Court.

VIII.

The court below held that petitioner could not complain of a failure of the hearing officer to give him a full and fair summary of the adverse evidence of the secret FBI report. See the opinion, Appendix A, pages 28-29. This holding is based on the fact that neither the law nor due process

of law requires it. This holding is contrary to *United States* v. *Gray*, 9th Cir., Sept. 22, 1953, 207 F. 2d 237, 241-242.

The court below speculated on the opinion by this Court in *United States* v. *Nugent*, 346 U. S. 1 (1953), and concluded (contrary to *United States* v. *Evans*, D. Conn., Aug. 20,1953, 115 F. Supp. 340; *United States* v. *Stasevic*, S. D. N. Y., Dec. 16, 1953, 117 F. Supp. 371; *United States* v. *Edmiston*, D. Nebr., Omaha Div., Jan. 28, 1954, 118 F. Supp. 238) that the *Nugent* opinion did not call for the hearing officer to give a full and fair summary of the adverse evidence. The position taken by the court below is contrary to the position taken by the Department of Justice in its interpretation of the *Nugent* opinion. Before the *Nugent* opinion the procedure of the Department of Justice was to give only the "general nature" of the unfavorable evidence. See Appendix D below, pages 42-43. After the *Nugent* opinion the Department of Justice amended the procedure for conduct of hearing officers. The new instructions give the registrant a "full and fair résumé" of the unfavorable evidence.—See Appendix E, below, pages 43-45.

In *United States* v. *Nugent*, 346 U. S. 1, 6 (1953), the Court said: "We think the Department of Justice satisfies its duties under § 6(j) when it accords a fair opportunity to the registrant to speak his piece before an impartial hearing officer; when it permits him to produce all relevant evidence in his own behalf and at the same time supplies him with a fair résumé of any adverse evidence in the investigator's report."

The court below said that the above-quoted language did not mean that this Court meant what it said. The court below, as its last refuge, said that the above-quoted language was dictum. Dictum or not, the language above quoted is plain and means what it says. The holding of the court below is in direct conflict with it. If this Court fails to find a conflict with a decision by this Court then the question presented must be considered as important enough to require the granting of the writ.

VIII.

The court below determined that there was no error in exclusion of the secret FBI investigative report from the evidence by the trial judge. It had been offered for the purpose of proving that the hearing officer had not given to petitioner a full and complete résumé of the adverse evidence in the FBI report used by the hearing officer. The same question here involved is presented in *Simmons* v. *United States,* No. 251, October Term, 1954. In that case the petitioner, as well as the brief in opposition filed by the Solicitor General, shows that the question is important and one not yet determined by this Court but which should be. See the petition at pages 5, 22 to 23 and the brief in opposition, pages 14 to 19, No. 251, October Term, 1954. The Court is referred to the discussions appearing in those documents for further reasons why the writ should be granted in this case. The question in each case is identical. Since the writ should be granted in the *Simmons* case (No. 251) it should be granted in this case.

CONCLUSION

WHEREFORE, for the reasons above stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

HAYDEN C. COVINGTON

Counsel for Petitioner

October, 1954.

APPENDIX A

Opinion of Court Below

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Clair Laverne White,
Appellant,

vs.

United States of America,
Appellee.

No. 13,893
Sep. 14, 1954

Appeal from the United States District Court for the Southern District of California, Central Division.

Before STEPHENS, BONE and POPE, Circuit Judges.

POPE, Circuit Judge.

The appellant was charged with refusal to be inducted into the armed forces of the United States in violation of the Universal Military Training and Service Act, 50 App. U. S. C. A. Sec. 462. Appellant had registered with a local draft board in Los Angeles, July 14, 1949, the day following his 18th birthday. In addition to his classification questionnaire he filed with the Board an executed "Special Form for Conscientious Objector," in which he asserted that by reason of religious training and belief he was conscientiously opposed to participation in war in any form and to participation in noncombatant training or service in the armed forces.

On January 15, 1951, he was classified in Class I-A-O, "conscientious objector available for noncombatant military service only."[1] He was notified of this action and thereupon requested and was granted a personal appearance and hearing before the local board. After the hearing the board continued him in Class I-A-O. He appealed to the appeal board which reviewed his file and "determined that such registrant is not entitled to classification in either a class lower than IV-E or in Class IV-E." The board forwarded the file to the Department of Justice for an advisory recommendation. Appellant personally appeared before a hearing officer on March 6, 1952. An FBI report of an investigation of the registrant had been furnished this hearing officer who recommended that the appellant be retained in Class I-A-O. This recommendation the Attorney General followed and upon his advice registrant was placed in that class by the board of appeals on May 3, 1952. Appellant made a fruitless effort to induce the National Director to appeal his case to the President; he was ordered to report for induction, but he refused to submit thereto.

Upon this appeal but two contentions are made: the first is that there was no basis in fact for the appellant's classification in Class I-A-O, but that he was entitled as a matter of law to I-O, that is to say, as a person conscientiously opposed to both combatant and noncombatant military service. The second contention is that the court below committed reversible error in refusing to receive in evidence the FBI report.

Appellant can make a defence under his first point "only

[1] Regulations, Selective Service System, Title 32, Sec. 1622.6 (a), 1949 Ed., provided: (p. 812) "In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces." The same provision is Sec. 1622.11 (a) of the 1951 Edition. Sec. 1622.20 of the 1949 Regulations provided for a Class IV-E "Conscientious Objector opposed to both combatant and noncombatant training and service." In the 1951 Edition that class is described in Section 1622.14 as Class I-O.

if there is *no basis in fact* for the classification which [the board] gave the registrant." (Emphasis added.) *Estep* v. *United States*, 327 U. S. 114, 122. The appellant says: "There is no basis in fact for classification in this case because there are no facts which contradict the documentary proof submitted by the appellant." The argument appears to add up to the proposition that since the appellant stated in his questionnaire and in letters addressed to the boards that he was conscientiously opposed not only to combatant service but to noncombatant service as well, and since these statements were supported by letters from his mother and his minister, the selective service boards were obliged to make findings in accordance with his claims, in the absence of other affirmative evidence which contradicted his representations. This argument relies upon *Dickinson* v. *United States*, 346 U. S. 389, and appellant's position is that the rule of that case must be applied here.

We think that the facts of the case do not call for any such conclusion. The question before the local board had to do not with what religious organization or sect the appellant adhered to, nor what the teaching of that sect or organization was, but what was the sincere belief of this particular registrant and what was the extent of his conscientious opposition to military service.[2] In other words, the local board initially, and the appeal board subsequently, were

[2] It is noted that the exemption authorized by section 6(j) of the Act, (50 App. U.S.C.A. Sec. 456(j)) is based upon the religious belief of the particular individual, not upon the religious tenets of an organization of which he is a member. The reference is to "an individual's belief." See *Gonzales* v. *United States*, 6 cir., 212 F. 2d 71, 72: ". . . members of the sect are not necessarily, by virtue of their membership, conscientious objectors, but each determines, according to his own conscience and according to his personal interpretation of the Bible, whether he may conscientiously engage in military service." In *United States* v. *Simmons*, 7 cir., 213 F. 2d 901, (decided June 15, 1954) it is said: "Affiliation with a particular religious sect does not *per se* entitle a registrant to conscientious objector status. The duty imposed on the boards is to determine subjectively and objectively the sincerity of the individual's belief, not the nature of the teachings of any religious faith." Cf. *Linan* v. *United States*, 9 cir., 202 F. 2d 693.

called upon to evaluate a mental attitude and a belief. It is plain that when such matters are to be determined and passed upon, the attitude and demeanor of the person in question is likely to give the best clue as to the degree of conscientiousness and sincerity of the registrant, and as to the extent and quality of his beliefs. The local board, before whom the registrant appeared, had an opportunity surpassing that available to us or to the appeal board itself to determine and judge as to these matters.

Whether conscientious objectors shall be granted by law an exemption from military service is simply a matter of grace. *Local Draft Board No. 1 of Silver Bow County,* v. *Connors,* 9 Cir., 124 F. 2d 388, 390. We deal here with a scheme provided by the legislation and the regulations whereby the question of an individual's right to exemption on account of conscientious objection may be determined in an orderly manner. Thus provision is made for local draft boards, made up of persons acquainted with the local community, and for the personal appearance by the registrant before that board. It would be absurd to think Congress contemplated that it would ever be possible for such a board to provide affirmative evidence as to the mental state of such a registrant. Yet it was obviously not contemplated that all who asserted or swore that they were conscientious objectors should be so classified.

Both boards here were confronted with an attitude which did not precisely fit into the Act's definitions of this claimed exemption. The language of the Act refers to a person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." There was evidence that White did not precisely fall into this category. For his conscientious objection was a much broader one,—it was an objection to any *governmental* service whatever. As he put it in a letter to the local board: "I cannot and will not serve or swear allegiance to anybody or anything but Jehovah God." He quoted James 1:27 as telling "us to keep ourselves unspotted from this

world. We cannot serve two masters." After his appeal had been denied he wrote to the local board: "Now if I go ahead and put my efforts toward doing governmental work, I will not be able to carry out my covenant obligations to God . . . I hope you can realize why I want to be exempted from being forced to do governmental work or being drafted into the armed forces." He spoke of his belief that he "should have no part in the doings of this old world even though [he] may be prosecuted for it." He spoke of his conscientious opposition "to doing or aiding in the wars or affairs of this world." In his conscientious objector form he stated: "We obey the laws of the land only as long as they do not conflict with God's laws." Thus these boards might with reason conclude that they dealt with a registrant whose primary conscientious objection is to *governmental* activity.

Furthermore, the board was cognizant of the fact, disclosed in the questionnaire, and in the registrant's personal appearance before it, that registrant was engaged as an employee of a concern making parts for Douglas Aircraft. The report of the hearing officer shows that these were war contracts on which he was thus employed from 1949 to 1951. The Board's minutes of what transpired at the time of his personal appearance did not purport to be a verbatim account of all that was then said or done. It is obvious, however, that the board was given to understand from the information then furnished it that the registrant was engaged in the manufacture of military equipment.[3]

In view of his experiencing no difficulty working upon the manufacture of munitions for war, the board was not without justification in concluding that White had no con-

[3] The minutes relating to his personal appearance on January 29, 1951, read as follows: "Selective Service System. January 29, 1951. Clair Laverne White, 4 82 31 272, appeared before the Local Board for a personal appearance. Folks went into Jehovahs [sic] Witness religion around 1930. Registrant was baptised into religion 1941. Employer is North Hollywood Tool and Die Manufacturing Co. Make parts for Douglas Air Craft, also North American. Steel Priority #1. Board feels employment status such as to indicate remaining in I-Ao [sic] classification, after careful review of file. L.P.F." This was during military activity in Korea.

scientious objection to participation in war through the manufacture of arms and munitions, just so long as he did so for a private company and not for the government. It was therefore but natural for the boards to believe that if the registrant's conscience was not bothered while working on war contracts he could not justly claim he was conscientiously opposed to noncombatant participation in war activities and that his mere objection to wearing a uniform because it marked him as one working for the government was not the kind of objection contemplated by the statute. Objection to serving a country, even on religious grounds, is not the standard under the statute. The registrant's facility in forwarding the cause of war, force and killing through activity in a war plant, may well demonstrate his failure to establish his status as a person conscientiously opposed to noncombatant duty.

We think that it cannot be adjudged that the local board with its opportunity to size up the registrant upon his personal appearance, which could evaluate his sincerity as it observed his manner and demeanor, and which moreover was confronted by a young man whose obvious objection was not so much to making instruments of death as to doing *anything* for or on behalf of the government, can be said to have acted without basis in fact when it concluded the appellant's conscientious objection did not extend to noncombatant service.

Whether the board was right in that conclusion is not a matter relevant here. "The courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous." *Estep* v. *United States,* supra, p. 122.

We therefore conclude that the situation present here is very different than present in the *Dickinson* case. In *United States* v. *Simmons,* supra, note 2, the court said: "[A] distinction must be drawn, we believe, between a claim

of ministerial status and a claim of conscientious objection status as to susceptibility of proof. Whether a registrant is a minister in the statutory sense, having as his principal vocation the leadership of and ministering to the followers of his creed, is a factual question susceptible of exact proof by evidence as to his status within the sect and his daily activities. No search of his conscience is required. Even though the only tenet of his cult be a belief in war and bloodshed, he still would be exempt from military service if he were, in fact, a minister of religion. Is he affiliated with a religious sect? Does he, as his vocation, represent that sect as a leader ministering to its followers? These questions are determinative and subject to exact proof or disproof.

"The conscientious objector claim admits of no such exact proof. Probing a man's conscience is, at best, a speculative venture. No one, not even his closest friends and associates, can testify to a certainty as to what he believes and feels. These, at most, can only express their opinions as to his sincerity. *The best evidence on this question may well be, not the man's statements or those of other witnesses, but his credibility and demeanor in a personal appearance before the fact-finding agency.* We cannot presume that a particular classification is based on the board's disbelief of the registrant, but, just as surely, the statutory scheme will not permit us to burden the board with the impossible task of rebutting a presumption of the validity of every claim based ofttimes on little more than the registrant's statement that he is conscientiously opposed to participation in war." (Emphasis added.)[4]

The action of the appeal board in confirming the classification cannot be said to be without basis in fact in view of the appeal board's knowledge that the local board's

[4] There is language in *Schuman* v. *United States*, (9 cir.), 208 F. 2d 801, 804, which, detached from the text in which it is used, is apparently at variance with what is here said. But in that case it was held that the registrant was entitled to a ministerial classification, and hence determination of his status as a conscientious objector was unnecessary to the decision and what was said on that matter was obiter. The question we here consider was not presented in that case.

determination had been arrived at after its opportunity to observe the registrant's demeanor during his personal appearance.[5] The appeal board likewise had before it, as did the local board, the fact that this registrant's apparent conscientious objection was to any participation in any kind of governmental activity. The situation thus presented to the appeal board was not substantially different from that presented in *United States* v. *Sicurella*, 7 cir., 213 F. 2d 911, decided on the same day that court decided the *Simmons* case. There it was said: "Statements made by appellant in his SSS Form 150 express an objection to any and all obedience to secular authority. Thus he stated that he is 'no part of this world which is governed by political systems,' that he conscientiously objects 'to serving in any military establishment or any civilian arrangement that substitutes for military service' and that he 'cannot desert the forces of Jehovah to assume the obligations of a soldier of this world without being guilty of desertion.'

"Two things are apparent on the face of these statements, i.e., that appellant sets himself separate and apart from all other persons as immune from the constitutional dictates of the national government and that he is asserting a claim of exemption extending to both military and civilian service under the Act, a claim which goes beyond the stautory [sic] exemption. 50 App. U. S. C. Sec. 456(j). These claims are consistent only with objections to any command of governmental authority, but do not *per se* establish that deep seated conscientious belief which would entitle appellant to the claimed exemption. On this basis the board could conclude that appellant had not proved himself within the terms of the statutory privilege. Only the boards, local and appellate, are empowered to make that deter-

[5] In this respect its action was just the opposite of that taken by the National Appeal Board in *United States* v. *Hagaman*, (3 cir.), 213 F. 2d 86, and there disapproved. In that case the appeal board, acting on the recommendation of the hearing officer and of the Department, classified the registrant as I-O. But the National board, "on the paper record alone," disapproved and placed him in I-A.

mination. We cannot say that the order here challenged is without a basis in fact."

When White was called before a hearing officer he asked the latter if there was anything unfavorable in the investigative report of the FBI. He was told there was no unfavorable evidence in the report. At the trial below White subpoenaed this report and it was marked for identification. But the trial court excluded it from evidence. This action gives rise to the second point raised by the appellant.

In *United States* v. *Nugent*, 346 U. S. 1, it was settled that the hearing officer's refusal to disclose the entire FBI report does not violate a registrant's rights under the Act or render his classification illegal. The appellant here argues, however, that the *Nugent* case held that the registrant must be given by the hearing officer a fair résumé of any adverse evidence in the investigative report. Proceeding from this premise, he argues that upon his trial he was entitled to examine and introduce in evidence the FBI report for the purpose of laying a foundation for an argument that the hearing officer did not in fact give him a fair résumé or truly state that there was no adverse evidence in the report. Here appellant relies upon the decision and the reasoning in *United States* v. *Evans*, 115 F. Supp. 340.*

We think that this position of the appellant cannot be maintained. In the first place, we agree with what is said in *United States* v. *Simmons*, supra, to the effect that the question of whether a fair summary of the FBI report must be given by the hearing officer to the registrant was not in issue in the *Nugent* case. Nugent had not requested such

* (P. 343): "It is my opinion that I cannot conscientiously determine that the resume was fair without an opportunity to inspect the investigative report of which it is claimed to be a resume. I think the Act should not be interpreted to mean that any communication by the hearing officer to the registrant with reference to the investigative report is conclusively presumed to be a fair resume. Even if the resume given be deemed presumptively fair, on trial the registrant must be allowed to combat the presumption by the only means possible—comparison with the investigative report itself." This rule has been followed in a number of cases which are collected in *United States* v. *Simmons*, supra.

a summary. Packer had been informed there was nothing in the report adverse to him. There was therefore no occasion for the court to prescribe a résumé as a part of the minimum procedural rules.[1]

When the Court spoke of a "fair résumé of any adverse evidence," it was referring to what it had called "the procedure, established by regulation and practice" which the Department of Justice had been following. As pointed out by the Court, (page 4) the registrant was allowed to appear in person and "upon request, he is entitled to be instructed 'as to the general nature and character' of any 'unfavorable' evidence developed by the Department's investigation." In other words, that is the way the Department did it. We find nothing in the opinion to indicate that the Supreme Court considered that the summary thus referred to was required by statute or the demands of due process.

We think that those cases which follow *United States* v. *Evans,* supra, have misunderstood the true holding of *United States* v. *Nugent.* In that case, speaking of the requirements of Sec. 6(j) in respect to a hearing before the hearing officer, the court said (p. 6): "The argument rides hard

[1] In *United States* v. *Simmons,* supra, it was said: "The Government insists, correctly we think, that the only issue before the court, which is pertinent to the question before us, was as to the right to inspect the F.B.I. file and that the last quoted language is obiter occurring in approving the procedure followed by the hearing officer in Nugent's hearing.

"The government's contention is persuasive when the above quotations are considered together. Had the court intended to prescribe the minimum procedural rules for such hearings, it is not unreasonable to assume that it would have done so expressly in its discussion on the issue of constitutionality. There the court said that the hearing must be more than 'sham' but need not be a 'litigious controversy.' Thus we are told that somewhere between these two extremes lies the line between due process and arbitrary action. We are told further that the procedure employed by the hearing officer in Nugent's case falls within the realm of due process. It does not follow from this that the *Nugent* procedure presents the minimum safegards which will afford the registrant due process. Furthermore, the court indicated that Nugent and Packer had waived their right to object to any failure on the part of the hearing officer to give them a full summary of the evidence because they had failed to request such a summary. 346 U. S. at 6, n. 10. Thus the issue now facing us was not before the court in *Nugent.*"

upon the word 'hearing' in Sec. 6(j). It is suggested that the 'hearing' prescribed by Congress was purposely designed to allow the registrant to refute—item by item, if necessary—the matters discussed in the investigator's report. In sum, respondents assimiliate the 'hearing' in Sec. 6(j) to a trial and insist that it imports a right to confront every informant who may have rendered adverse comment to the FBI.

"The statute does entitle the registrant to a 'hearing,' and of course no sham substitute will meet this requirement; but we do not think that the word 'hearing'—when put in the context of the whole scheme for review set forth in Sec. 6(j)—comprehends the formal and litigious procedures which respondents' interpretation would attribute to it. Instead, the word takes its meaning in this instance from an analysis of the precise function which Congress has imposed upon the Department of Justice in Sec. 6(j)."

After thus referring to the function which the section imposes upon the Department of Justice, the court significantly cited *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294. At the conclusion of the opinion the court said: "Under the circumstances presented, we cannot hold that the statute, as we construe it, violates the constitution." Here, again significantly, the court cited the *Norwegian Nitrogen Co.* case and also *Williams* v. *New York,* 337 U. S. 241.

We think that these two cases give the clue to what the court had in mind in the *Nugent* case as to the type of hearing which was provided by Sec. 6(j).[8]

[8] The *Norwegian Nitrogen* case dealt with that provision of the Tariff Act of 1922 which authorized the President to increase or decrease tariff rates but provided that before proclamation was made by the President, the Tariff Commission should make an investigation in order to assist the President. The act provided that "The Commission shall give reasonable public notice of its hearing and shall give reasonable opportunity to the parties interested to be present, to produce evidence, and to be heard." It was held that upon a hearing held pursuant to the statute, domestic producers appearing before the Commission might properly furnish their cost of production subject to a pledge of secrecy, and that

Each case furnishes an illustration of a type of investigation and report in respect to which no opportunity is granted the parties affected to pry into the sources of the information or to cross-examine the informers. We think that the reference to these two cases discloses that the Supreme Court had in mind the fact that the hearing provided for in Section 6(j) is one for the benefit of the registrant and for the purpose of making possible a report favorable to him. The only provision for the making of a recommendation by the Department of Justice is: "The Department of Justice shall, after such hearing, *if the objections are found to be sustained,* recommend to the appeal board that . . . he shall be assigned to noncombatant service as defined by the President, or . . . be ordered by his local board . . . to perform . . . such civilian work . . .," etc. (Emphasis added.) The fact that the Act itself makes no express provision for anything except a favorable report, cannot be

their foreign competitors appearing at the hearing were not entitled to require the production of this information or to examine or cross-examine concerning it. The court held that the hearing was not one that might be demanded as of right, that it was not intended to be similar to a trial as conducted in a court, but rather a hearing which partook of the nature of the congressional hearings which sometimes precede legislation. In other words, the mere statutory provision for a hearing did not convert an essentially legislative proceeding into an adversary one as in an ordinary law suit.

In *Williams* v. *New York*, the court upheld as against the charge that it was wanting in due process, the practice of New York trial judges when pronouncing sentence in state criminal cases to make use of information contained in reports of probation officers notwithstanding these reports were based upon information supplied by witnesses with whom the accused had not been confronted and as to whom he had no oportunity for cross-examination or rebuttal. Pointing out that information of the kind commonly relied upon by judges in attempting to make intelligent imposition of sentences would be unavailable if that information were restricted to that given by witnesses in open court subject to cross-examination, the court said (p. 249): "Under the practice of individualizing punishments, investigational techniques have been given an important role. Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders. Their reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guess-work and inadequate information."

without significance. See *Elder* v. *United States,* 9 cir., 202 F. 2d 465, 468.[9]

This is clearly the theory upon which the regulations have been framed. Thus Section 1626.25 of Regulations, Title 32, in dealing with the procedure where the registrant claims to be a conscientious objector, provides for the transmission of the file to the Department of Justice only in case the appeal board first determines that the registrant is not entitled to be placed in Class I-A-O or in Class I-O. (Subdivisions 2, 3, 4) Subdivision (b) then provides: "No registrant's file shall be forwarded to the United States Attorney by any appeal board and any file so forwarded shall be returned, unless in the 'Minutes of Actions by Local Board and Appeal Board' on the Classification Questionnaire (SSS Form No. 100) the record shows and the letter of transmittal states that the appeal board reviewed the file and determined that the registrant should *not* be classified in either Class I-A-O or Class IV-E under the circumstances set forth in paragraph (a) (2) or (4) of this section." (Emphasis added.)

Congress might well have provided that after the appeal board had made its decision upon the conscientious objector claim, the Selective Service proceedings were at an end.[10] Under the Regulations the appeal board must first pass judgment upon whether the registrant is entitled to the exemption claimed. If it decides in his favor that is an end of the matter and no Department of Justice hearing is required. It is only when the appeal board denies the claim that the hearing is provided for. We think this discloses that the Regulations contemplate that the hearing is

[9] It is here that we find one distinction between this case and *United States* v. *Gray,* (9 cir.), 207 F. 2d 237. The FBI report and the other documents there considered related to a security check in connection with screening of seamen under the Magnuson Act. That material was collected in an effort to ascertain matters adverse to the seaman.

[10] As stated in the *Nugent* case, (p. 8), "Congress was under no compulsion to supply this auxiliary service."

designed to ascertain whether new *support* for the registrant's claim is obtainable.[11]

We see nothing in the requirements of the statute or in the demands of due process or in what was decided in the *Nugent* case which would require that any portion of an FBI investigation undertaken for these purposes should be made available to the registrant either before the hearing officer or at the time of his prosecution for failure to submit to induction. All of the practical considerations relating to a probation report which were alluded to in *Elder* v. *United States,* (footnote 11, supra), and in *Williams* v. *New York,* supra, apply here as reasons for denying similar access to the FBI report.

Finally, as we view it, the decision in the *Evans* case, supra, seems to assume that the Supreme Court failed to see the whole picture when it decided the *Nugent* case. But we think the court must have had in mind all the considerations which we have just mentioned. It knew that Packer, like Evans, had been told by the hearing officer that there was nothing unfavorable in the FBI report. It is true that it was not considering assignments by Nugent and Packer that their offers of proof of the FBI reports were rejected in the trial court. But surely the Supreme Court knew perfectly well that if there were anything to appellants' present contention such would normally be Nugent and Packer's next step, once they were put on trial. We refuse to believe that the Court labored and brought forth a mouse of a decision that the hearing officer need not show the FBI report when the situation was such that the trial court must necessarily admit it.

We find no error in the record and the judgment is affirmed.

[11] It is a matter of common knowledge that if the FBI is to obtain from neighbors or acquaintances of the registrant a report on which it can rely, it is essential "that frankness on the part of persons interviewed be encouraged by assurance that their identity will not be divulged," *Elder* v. *United States,* supra, at p. 469. A favorable report by a neighbor who expects to have his identity disclosed to the registrant would not be worth much.

APPENDIX B

Judgment of Court Below

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Clair Laverne White,
Appellant,

vs.

United States of America,
Appellee.

No. 13893

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered September 14, 1954.

APPENDIX C

Statutes and Regulations Involved

Section 6(j) of the Act

Section 6(j) of the act (50 U.S.C. App. (Supp. V) §456(j), 65 Stat. 75, 83, 86) provides:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of

section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recom-

mendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."—50 U. S. C. App. (Supp. V) § 456(j), 65 Stat. 75, 83, 86.

Section 1622.14 of the Regulations

Section 1622.14 of the Selective Service Regulations (32 C. F. R. § 1622.14 (1951 Rev.)) provides:

"Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.—(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to both combatant and noncombatant training and service in the armed forces."

Section 1624.2(b) of the Regulations

Section 1624.2(b) of the Selective Service Regulations (32 C. F. R. § 1624.2(b) (1951 Rev.)) provides: *"Appearance Before Local Board, . . .* (b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom

the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary."

Section 1625.2 of the Regulations

Section 1625.2 of the Selective Service Regulations (32 C. F. R. § 1625.2 (1951 Rev.)) provides:

"When Registrant's Classification May Be Reopened and Considered Anew.—The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

Section 1626.24(b) of the Regulations

Section 1626.24(b) of the Selective Service Regulations (32 C. F. R. § 1626.24(b) (1951 Rev.)) provides:

"Review by Appeal Board.—. . . . (b) In reviewing the appeal, the appeal board shall not receive or consider any information which is not contained in the record received

from the local board except (1) the advisory recommendation from the Department of Justice under section 1626.25, and (2) general information concerning economic, industrial, and social conditions."

Section 1626.25 of the Regulations

Section 1626.25 of the Selective Service Regulations (32 C. F. R. § 1626.25 (1951 Rev.)) provides:

"*Special Provisions When Appeal Involves Claim That Registrant Is a Conscientious Objector.*—(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

"(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to combatant training and service in the armed forces, but not conscientiously opposed to noncombatant training and service in the armed forces, the appeal board shall first determine whether or not such registrant is eligible for classification in a class lower than Class I-A-O. If the appeal board determines that such registrant is eligible for classification in a class lower than I-A-O, it shall classify the registrant in that class. If the appeal board determines that such registrant is not eligible for classification in a class lower than Class I-A-O, but is eligible for classification in Class I-A-O, it shall classify the registrant in that class.

"(2) If the appeal board determines that such registrant is not eligible for classification in either a class lower than Class I-A-O or in Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(3) If the registrant claims that he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, the appeal board shall first determine whether or not the registrant is eligible for classification in a class lower than Class I-O. If the appeal board finds that the registrant is not eligible for classification in a class lower than Class I-O, but does find that the registrant is eligible for classification in Class I-O, it shall place him in that class.

"(4) If the appeal board determines that such registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(b) No registrant's file shall be forwarded to the United States Attorney by any appeal board and any file so forwarded shall be returned, unless in the 'Minutes of Action by Local Board and Appeal Board' on the Classification Questionnaire (SSS Form No. 100) the record shows and the letter of transmittal states that the appeal board reviewed the file and determined that the registrant should not be classified in either Class I-A-O or Class I-O under the circumstances set forth in subparagraphs (2) or (4) of paragraph (a) of this section.

"(c) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if

the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

"(d) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice."

Section 1626.26 of the Regulations

Section 1626.26 of the Selective Service Regulations (32 C. F. R. § 1626.26 (1951 Rev.)) provides:

"*Decision of Appeal Board.*—(a) The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant, except that an appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed forces to be disqualified for any military service because of physical or mental disability.

"(b) Such classification of the registrant shall be final, except where an appeal to the President is taken; provided, that this shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of part 1625 of this chapter."

APPENDIX D

Defective Instructions in Use Before July, 1953, from 1951 to 1953

Department of Justice
Washington, D. C.

Instructions to Registrants Whose Claims for Exemption as Conscientious Objectors Have Been Appealed.

Pursuant to the provisions of section 6(j) of the Universal Military Training and Service Act and Section 1626.25 of the Selective Service Regulations, the Department of Justice will make an inquiry and hold a hearing with respect to the character and good faith of your claim for exemption from training and service under the said Act on the ground that you are conscientiously opposed to participation in war in any form.

1. The hearing will be conducted by the undersigned, a Hearing Officer duly designated by the Department of Justice as a Special Assistant to the Attorney General.

2. At the hearing you will be permitted to make a full and complete presentation of your claim. You may bring with you to the hearing as witnesses any persons who have personal knowledge of facts concerning your religious training and belief and concerning the character and good faith of your objections to participation in war in any form.

3. You may bring with you and submit at the hearing written statements of persons not present at the hearing containing facts and information within their personal knowledge concerning your religious training and belief and the character and good faith of your objections to participation in war in any form. Such statements shall be sworn to or affirmed before a notary public or other person authorized to administer oaths. You may also submit at the hearing any papers or documents, or certified copies thereof, tending to support your claim. If you are unable to ap-

pear personally at the hearing, you may mail all such statements, documents, etc., to me at the address given in the Notice of Hearing.

4. The hearing will not be in the nature of a trial or judicial proceeding, but will be informal and non-legalistic. You will not be required to adhere to the ordinary rules of evidence. It will not be necessary for you to be represented at the hearing by an attorney. You may bring with you a relative or friend or other adviser, who may sit with you at the hearing. Such person, whether an attorney or not, will not be permitted to object to questions or make any argument concerning any evidence or any phase of the proceeding. The hearing will at all times be under my direction and control. Violation of these instructions by you or your adviser may result in the termination of the proceeding.

.....

Special Assistant to the
Attorney General

APPENDIX E

[New Instructions Since July 1953]

Addendum No. 1 to Instructions to Hearing Officers Appointed Pursuant to the Universal Military Training and Service Act

Notice of Hearing and Instructions to Registrants Whose Claims for Exemption as Conscientious Objectors Have Been Appealed

1. Pursuant to the provisions of section 6(j) of the Universal Military Training and Service Act (P. L. 51, 82nd Cong., 1st Session; 50 USC App. 466(j), hereinafter referred to as the Act, and section 1626.25 of the Selective Service Regulations, the Department of Justice will make

an inquiry and hold a hearing with respect to the character and good faith of the registrant's objections to training and service under the Act on the ground that the registrant is conscientiously opposed to participation in war in any form. The scope of the hearing is restricted to consideration of the merits of the conscientious objector claim. Consideration of ministerial claims and all other claims is within the exclusive jurisdiction of the Selective Service System.

2. The hearing will be conducted by the undersigned, a Hearing Officer duly designated by the Department of Justice as a Special Assistant to the Attorney General of the United States.

3. It is incumbent upon the registrant to establish that he is entitled to the conscientious objector classification he claims. The registrant has a right to appear at the hearing and make a full and complete presentation of his claim. The registrant may testify orally and may present witnesses in support of his claim. However, no Government funds are available for the payment of witness fees or travel expenses.

4. The registrant may also submit at the hearing written statements or documents, or certified copies thereof, in support of his claim. Written statements shall be sworn to or affirmed before a notary public or other persons authorized to administer oaths.

5. Attached hereto is a resume of the information developed by the inquiry conducted pursuant to the aforementioned Act. At the hearing the registrant will be entitled to discuss the information contained in the resume and to present witnesses to refute or corroborate such information.

6. The hearing will not be in the nature of a trial or judicial proceedings, but will be informal and non-legalistic. Legal rules of evidence will not apply at the hearing, but reasonable bounds will be maintained as to relevancy and materiality. In addition to his witnesses the registrant may have an attorney, relative, friend, or other adviser present at the hearing. Such person, whether an attorney or not, will not be permitted to object to questions, or to make any argu-

ment concerning the proceeding. In order that the conduct of the hearing may comport with the necessary requirements of dignity, orderliness, and expedition, the Hearing Officer will be the sole judge in the matter of choice of a method of procedure designed to effectuate the desired result.

7. Failure to comply with these instructions may result in the termination of the proceeding.

....., Hearing Officer

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220609—54

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 390

CLAIR LAVERNE WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (2 R. 61–74) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 14, 1954 (2 R. 75). The petition for a writ of certiorari was filed on October 6, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the classification of petitioner by the selective service system as available for

noncombatant service was without basis in fact.

2. Whether the court below erred in affirming the action of the trial judge who, pursuant to examination of F. B. I. reports *in camera*, denied admission of the reports in evidence.

STATUTE INVOLVED

Universal Military Training and Service Act, 62 Stat. 604, 612, 622; 65 Stat. 75, 86:

> Section 6 (j) [50 U. S. C. App. 456 (j)]:
>
> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board,

subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian

work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. * * *

Section 12 (a) [50 U. S. C. App. 462 (a)]:

Any * * * person * * * who * * * refuses * * * service in the armed forces * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

STATEMENT

Petitioner seeks review of a judgment of the Court of Appeals for the Ninth Circuit (2 R. 75), affirming the judgment of the District Court for the Southern District of California finding him guilty of violating the Universal Military Train-

ing and Service Act by refusing on July 18, 1952, to be inducted into the armed forces, and imposing a sentence of four years' imprisonment (1 R. 23, 27–28).

Petitioner's record with the selective service system may be summarized as follows:

On July 14, 1949, petitioner, who was then age 18, registered under the selective service laws, indicating as his occupation, "press operator" in the North Hollywood Tool and Die Manufacturing Co. in Hollywood, California (Gov. Ex. 1, p. 1).[1] On November 9, 1950, he filed his questionnaire, stating, *inter alia*, that he was a minister of Jehovah's Witnesses but "I do not regularly serve as a minister" (Gov. Ex. 1, p. 7). He left the space relative to ordination blank. He stated, further, that he worked 48 hours per week as a "punch press operator and set-up man" for the North Hollywood Tool and Die Manufacturing Co. where he had worked since April 15, 1949, receiving pay at the rate of $1.20 per hour; that he expected to continue indefinitely in this work; that he previously had been employed as a spray painter; and that his education had stopped after high school (Gov. Ex. 1, pp. 8–10). Petitioner signed the space in which conscientious objectors indicate their claim to such status (Gov. Ex. 1, p. 11). He also claimed physical exemption on the basis that he suffered from hay fever, receiv-

[1] Petitioner's selective service file is lodged with the Court as Government Exhibit No. 1.

ing "medical aid" for this from a drugstore (Gov. Ex. 1, p. 11).[2] He left blank the space in which he was to indicate what he considered his proper classification (Gov. Ex. 1, p. 11).

In his special form for conscientious objectors, filed on November 20, 1950 (Gov. Ex. 1, pp. 15–20), petitioner stated that he was opposed to participation in both combatant and noncombatant service, that he believed in the use of force under no circumstances, and that he gave expression to his views "at every opportunity publicy [sic] and in the homes" (Gov. Ex. 1, pp. 15–16). He stated that his employer was the North Hollywood Tool and Die Manufacturing Co. where he continued to work as a punch press operator (Gov. Ex. 1, p. 16). He explained that his father and mother were Jehovah's Witnesses, that he had become a member in 1941 (when he was ten years of age) by immersion, that he attended a Kingdom Hall in San Fernando, California, and that (Gov. Ex. 1, p. 19) "We obey the laws of the land only as long as they do not conflict with gods [sic] laws." On January 15, 1951, petitioner was classified 1–A–O by unanimous vote of his local board, as eligible for induction for noncombatant duties only (Gov. Ex. 1, p. 12). On January 18, 1951, petitioner requested a hearing to show that he was entitled to 4–E (predecessor of 1–O) status (Gov.

[2] On his subsequent physical examination no clinical record of hay fever was found by medical authorities (Gov. Ex. 1, p. 55).

Ex. 1, pp. 12, 23). On January 29, 1951, petitioner appeared before his local board. The minutes of the board contain the following notation (Gov. Ex. 1, p. 22):

> CLAIRE LAVERNE WHITE 4 82 31 272, appeared before the Local Board for a personal appearance. Folks went into Jehovahs Witness religion around 1930. Registrant was baptized into religion 1941. Employer is North Hollywood Tool & Die Manufacturing Co. Make parts for Douglas Air Craft, also North American. Steel Priority # 1. Board feels employment status such as to indicate remaining in 1-Ao classification, after careful review of file.

A notation in the file also states (Gov. Ex. 1, p. 12):

> Employer engaged in defense work—Case not reopened—Continued 1-A-O.

Petitioner was again classified 1-A-O (Gov. Ex. 7, pp. 12, 24).

On February 2, 1951, petitioner's mother wrote a letter to the local board stating in essence that petitioner was a Bible student who attended Theocratic Ministry School once a week, that he spent his "spare time" in religious activity (the nature not described), and (Gov. Ex. 1, pp. 25-27) "It would be in direct conflict to his consciences [sic] to engage in any form of worldly conflict."

On February 5, 1951, petitioner wrote his local board with reference to appealing his case (Gov. Ex. 1, pp. 28-30). In this letter he stated that

teachings of his religion required him to "obey God rather than men," and keep "unspotted from this world." He stated "I am neutral in these conflicts between nations," and "Jehovah's Witnesses are a world wide organization and to go to war would mean killing our own brothers."

On March 1, 1951, petitioner forwarded to his local board various letters vouching for his sincerity and stating that he was an active participant in a congregation of Jehovah's Witnesses (Gov. Ex. 1, pp. 32–36).

On March 19, 1951, petitioner's selective service file was forwarded to his appeal board, which on April 11, 1951, made a tentative finding that he was not entitled to 4–E (predecessor of 1–O) status (Gov. Ex. 1, p. 12).

Petitioner appeared before a hearing officer for the Department of Justice on March 6, 1952. At the time of the hearing, petitioner was a tree trimmer but it is noted in the report that "from 1949 to 1951 he worked on war contracts." The report notes that he went to church two or three times a week, that it was petitioner's position that he "would not assist in any material way, but only spiritually in case of necessity" (Gov. Ex. 1, p. 42), and concluded (*ibid.*, p. 43):

> There is no question in my mind but that the registrant is sincere, but from all of the evidence I would recommend that he be placed in noncombatant service, or 1–A–O.[3]

[3] At the trial petitioner testified that he attended the hearing with his father (2 R. 38) and that he was questioned

This recommendation was forwarded by the Department of Justice to the appeal board on April 11, 1952 (Gov. Ex. 1, p. 44), and on May 19, 1952, he was again classified 1–A–O by unanimous vote of that body (Gov. Ex. 1, p. 12).

On May 27, 1952, petitioner attempted to appeal the decision to the President, and in a letter set forth that he was studying for the ministry (Gov. Ex. 1, p. 45). On June 3, 1952, he was notified by his local board that no further appeal was available to him inasmuch as his classification by the appeal board had been by unanimous vote (Gov. Ex. 1, p. 46).

On June 24, 1952, petitioner was ordered to report for induction on July 7, 1952 (Gov. Ex. 1, p. 47). About June 27, 1952, petitioner visited his local board and told its clerk that he was traveling east and would be back about July 14th or 15th. He was told that he could not do this as he was under order to report for induction and could only make a trip in case of death or serious illness in his family. He thereupon told the clerk that his grandmother was quite ill and that this was "partly the reason for this trip." He was

about such things as the length of time he had been a member of the Jehovah's Witnesses faith, and his beliefs (2 R. 39). He testified that he told the hearing officer that he could not do any work of material importance, even to milking a cow or feeding a soldier's wife because (2 R. 40) "that was not as important as doing the preaching work we were commanded to do." (There is no evidence of record that petitioner did any preaching.)

told to submit a letter from his grandmother's physician to this effect. He told the clerk that he did not intend to submit to induction anyhow and so it did not make much difference whether he reported or not. He indicated he intended to go on the trip in any event and would report on his return. (Gov. Ex. 1, p. 47.)

On July 7, 1952, petitioner failed to report for induction as orderd. On July 11, 1952, he was notified by his local board to report to it in five days or be declared delinquent (Gov. Ex. 1, pp. 12, 49). On July 14, 1952, his local board ordered him to report at the induction station on July 18, 1952 (Gov. Ex. 1, p. 49A). On the latter date petitioner appeared but refused to submit to induction as charged in the indictment (Gov. Ex. 1, pp. 12, 52).

At the time of his hearing before the Department of Justice hearing officer, petitioner was told that there was no material adverse to his claim in the F. B. I. report (2 R. 40–41). There is no mention of any F. B. I. material in the Department of Justice report (2 R. 44). On the trial of the case, petitioner subpoenaed the F. B. I. report contending that it should be made part of the selective service file available for inspection to detect undisclosed derogatory information (1 R. 15–16; 2 R. 3–22). The government moved to quash the subpoena on the ground that no adverse material was shown to exist, that the contents of the F. B. I. records were irrelevant to the Depart-

ment of Justice recommendation, and that no foundation was laid to support their production. The trial court examined the F. B. I. reports *in camera* and ruled that their evidentiary value to defendant was so slight as not to outweigh the general public interest in the preservation of the confidential character of executive documents (2 R. 47).[4]

DISCUSSION

1. This is a companion case to *Tomlinson* v. *United States*, No. 391 this Term, in that the selective service boards upheld petitioner's claim to exemption from combatant service while rejecting his claim for exemption from noncombatant service. It differs from *Tomlinson*, however, in that the record shows that registrant here worked as a punch press operator in a war plant which made parts for aircraft during a period of military activity in Korea. This fact, not explained by registrant, provides specific factual support, separate and apart from adherence to the tenets of his faith for the board's rejection of his claim of exemption from noncombatant service. As the court below stated (2 R. 65):

> In view of his experiencing no difficulty working upon the manufacture of munitions for war, the board was not without justification in concluding that White had no conscientious objection to participation

[4] These sealed F. B. I. reports (Def's. Exs. A, B, and C) have been lodged with this Court as part of the record.

in war through the manufacture of arms and munitions, just so long as he did so for a private company and not for the government. It was therefore but natural for the boards to believe that if the registrant's conscience was not bothered while working on war contracts he could not justly claim he was conscientiously opposed to noncombatant participation in war activities and that his mere objection to wearing a uniform because it marked him as one working for the government was not the kind of objection contemplated by the statute. Objection to serving a country, even on religious grounds, is not the standard under the statute.

In short, as the court below held, petitioner demonstrated by his conduct that he was not conscientiously opposed to work which directly furthered the prosecution of war. This ruling is not, as contended by petitioner (Pet. 14), in conflict with the decision of the Court of Appeals for the Seventh Circuit in *United States* v. *Wilson*, 215 F. 2d 443. There the court held that a record of employment as a railroad telegraph operator did not provide a basis in fact for the action of the National Selective Service Board in classifying registrant as available for *combatant* service after the local board and the appeal board by unanimous vote had each placed him in classification 1–O (conscientious objector exempt from both combatant and noncombatant service). Here, by

contrast, the boards upheld petitioner's claim to classification as one conscientiously opposed to killing. His war work was considered as evidence only that he was not conscientiously opposed to work not including killing which directly supported the army in the field.

This case is different from those now before the Court[8] in that it involves a 1–A–O classification (conscientious objector available for noncombatant military service only) and differs from *Tomlinson* in that the 1–A–O classification rests on an explicit factual basis separate and apart from petitioner's beliefs as a Jehovah's Witness. However, the common element of opposition by Jehovah's Witnesses on religious grounds to any military service, which caused us to suggest that it would be appropriate to defer action on the *Tomlinson* petition until the other cases are decided, is also present and requires the same recommendation here.

2. In this case, as in *Tomlinson,* petitioner contends that the trial court erred in refusing to permit him to inspect the F. B. I. reports which were before the Department of Justice hearing officer. As in *Tomlinson,* the trial court made an *in camera* investigation of the reports and found their evidentiary value to petitioner to be so slight as not to warrant their disclosure, considering

[8] *Sicurella* v. *United States*, No. 250; *Simmons* v. *United States*, No. 251; *Gonzales* v. *United States*, No. 69; *Witmer* v. *United States*, No. 164.

the public interest in the preservation of their confidential character (2 R. 47–48).

The considerations discussed in our memorandum in *Tomlinson* are applicable to this case as well. While we think the court below was correct in upholding the action of the trial court, this Court's decision in *Simmons*, No. 251, may have a bearing on the issue here presented. We are obliged, therefore, to suggest for this further reason that action on this petition be deferred until the Court has decided *Simmons*.

CONCLUSION

The decision below is correct on the facts and not in conflict with any decisions of other courts of appeals. Inasmuch, however, as it involves issues the determination of which may be affected by this Court's decisions in other cases now pending before it, it is suggested that it would be appropriate for the Court to defer action on this petition until the pending cases are decided.

Respectfully submitted.

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WARREN OLNEY III,
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J. F. BISHOP,
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NOVEMBER 1954.

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Supreme Court of the United States

OCTOBER TERM, 1954

No. 390

CLAIR LAVERNE WHITE,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY
TO MEMORANDUM FOR THE UNITED STATES

MAY IT PLEASE THE COURT:

I.

It is suggested by respondent that this Court ought to defer consideration of the petition for writ of certiorari in this case until after this Court has decided *Gonzales* v. *United States,* No. 69, October Term, 1954; *Witmer* v. *United States,* No. 164, October Term, 1954; *Sicurella* v.

United States, No. 250, October Term, 1954; and *Simmons* v. *United States,* No. 251, October Term, 1954. This suggestion of the respondent is not a good one.

There is an outstanding distinction between this case and the *Simmons* case. The court below decided that there was basis in fact for the denial of the conscientious objector status, because White had a personal appearance and was continued in Class I-A-O after such appearance. This point has been argued under point I in the Reply to Memorandum for the United States in the companion case of *Tomlinson* v. *United States,* No. 391, October Term, 1954. What is said there applies here.

The court below found that there was basis in fact for the denial of the full conscientious objector classification and the granting of the noncombatant military classification, because White had worked as a punch-press operator in a war plant that made parts for aircraft during the military activity in Korea. On this point the respondent quotes extensively from the opinion of the court below.

The Court has before it a similar question in *Witmer* v. *United States,* No. 164, October Term, 1954, but the decision to be made in the *Witmer* case will not control the decision by the court below in this case. The court below has made an artificial distinction between relevancy of civilian war work by a conscientious objector to the I-A classification and to the I-A-O classification. The court below has held in subsequent cases that the performance of war work is entirely irrelevant and immaterial to the I-A classification. (See *Franks* v. *United States,* No. 14,114, 9th Cir., Oct. 4, 1954, — F. 2d — ; and *Goetz* v. *United States,* No. 14,185, 9th Cir., Oct. 14, 1954, — F. 2d — .) The court below has held that the performance of civilian war work is not basis in fact for the I-A classification but that it is for the I-A-O classification. This is a distinction without a difference and an unreasonable interpretation of the law that will continue to stand as the law for all the

states within the jurisdiction of the court below. Defendants in criminal prosecutions that have been classified I-A-O (conscientious objectors willing to do noncombatant military service) will continue to be faced with the rule of the court below that the performance of civilian war work is basis in fact for that classification, notwithstanding the undisputed evidence showing in their files before the draft boards that they were conscientiously opposed to such noncombatant military service.

Since the decision by the court below on this point will not be affected by the decision that this Court will make in the other cases, the petition for writ of certiorari in this case ought to be granted and the case set down for oral argument along with the other pending cases.

It is much better for this Court to decide all of these related problems in one sweep. It would conserve the time and effort of the Court to have this case brought in for review and the case set down for argument along with the others. If this is not done the remaining problems that will be undecided by the other cases will have to be determined by this Court at a later date. The importance of the questions presented demands that the Court settle them at the same time it decides the other cases. To put off the day of judgment in this case would merely continue the confusion in the law, caused by the court below, as to the performance of civilian war work as basis in fact for the denial of the full conscientious objector classification when the board has ordered the registrant to do noncombatant military service.

II.

The respondent argues that denial of the use of the FBI report at the trial is harmless error because the hearing officer stated that he told White there was no material adverse to his claim in the FBI report. This has been answered in point 7 of the *Tomlinson* Reply to Memoran-

dum for the United States, where the quotation is made from the case of *United States* v. *Packer*, 2d Cir., 1952, 200 F. 2d 540 (reversed on other grounds, 346 U. S. 1 (1953)).

III.

The position taken by the respondent, that the performance of war work in a civilian plant is equivalent to willingness to do noncombatant military service, ignores reality. It defies the undisputed evidence here that White was conscientiously opposed to both combatant and noncombatant military service. The law on which this case should be determined is not based on logic or reason being made manifest in the conscientious objector claim, but on justice and fair play. While it might not seem reasonable to others, it was reasonable to White that he was willing to do civilian war work but unwilling to perform noncombatant military service. The law does not permit the draft boards or the courts to sit in judgment on the reasonableness of such conclusion. The only question the boards and the courts have to determine is whether White opposed noncombatant military service, based on religious training and beliefs. He established this fact by undisputed evidence. Even the Department of Justice found him to be sincere in his opposition to such service but it arbitrarily recommended that he be ordered to do military service because of his willingness to work in a war plant. This was no basis in fact even for the I-A-O classification. There is definite inconsistency, therefore, between the opinion of the court below in this case and its opinions in the cases of *Franks* v. *United States*, No. 14,114, Oct. 4, 1954, — F. 2d —, and *Goetz* v. *United States*, No. 14,185, Oct. 14, 1954, — F. 2d —.

CONCLUSION

This Court ought to grant the petition for writ of certiorari. To defer the granting of the petition until the other

cases are decided merely puts off the day of judgment. Since this Court will be called upon some time in the future to pass upon the question (and it must pass upon it in order to settle the law for the district courts in the states under the jurisdiction of the Ninth Circuit), it would be much better to hear all these cases together. It will do no good to determine all these questions piecemeal. It is just as well for conservation of time that this case be determined along with the other cases. To that end the petition for writ of certiorari should be granted now.

Respectfully submitted,

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Counsel for Petitioner

November, 1954.

JAN 6 19

Supreme Court of the United States

October Term, 1964

No. 390

CLAIR LAVERNE WHITE,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR PETITIONER

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Supreme Court of the United States

OCTOBER TERM, 1954

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UNITED STATES OF AMERICA,

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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SUPPLEMENTAL MEMORANDUM FOR PETITIONER

MAY IT PLEASE THE COURT:

Since the filing of the petition and the petitioner's reply to the memorandum of the United States the court below has handed down a number of decisions that are pertinent here.

Such decisions relate to the effect of a personal appearance before the local board, which has power to judge credi-

bility (which is known to the appeal board) as basis in fact for the denial of the conscientious objector status by the appeal board. It should be remembered that the registrant does not appear before the appeal board.

The court below in this case held, because of White's attitude when before the local board of refusal to do any governmental service, that the appeal board did consider this as evidence of his insincerity.

In *Hinkle* v. *United States*, Sept. 24, 1954, 216 F. 2d 8, 10 (pending on certiorari in this Court, No. 448, October Term, 1954), the court below found no basis in fact for the denial of the conscientious objector status. The court said that the denial "was not based upon any personal appearance of Hinkle."

The court below also (but later) in *Pitts* v. *United States*, No. 14,164, Dec. 7, 1954, qualified its holding in this *White* case. There the court held that because nothing in the memorandum of personal appearance made by the board showed that the credibility of Pitts was questioned by the local board, the case had to be determined by the papers in the file alone. The court below said: "We have therefore before us a situation which requires the application of the principle applied in the *Dickinson* case." The court found no basis in fact for denial of the conscientious objector status.

The same holding was made by the court below in *Affeldt* v. *United States*, No. 13,941, Dec. 14, 1954. There the court found no basis in fact for the denial of the conscientious objector status. The court said: "At any rate, nothing about the papers filed by Affeldt or in his personal appearance before the local board, would appear to warrant any finding of insincerity, sham or fakery in his claim that he was conscientiously opposed to participation in war in any form."

More recently, in *Ashauer* v. *United States*, No. 14,304, decided December 21, 1954, the court below held that it was necessary for the local board to show in its memorandum

something to indicate a finding of insincerity. The court said: "If anything which occurred at that interview, including Ashauer's demeanor or the manner in which he conducted himself, was inconsistent with or derogative of his avowal of conscientious objection, there is no hint of it in the board's memorandum regarding the interview." The court below then relied upon *Dickinson* v. *United States*, 346 U. S. 389 (1953); *Schuman* v. *United States*, 9th Cir., 1953, 208 F. 2d 801; *Jessen* v. *United States*, 10th Cir., 1954, 212 F. 2d 897; and *United States* v. *Close*, 7th Cir., 1954, 215 F. 2d 439 (No. 447, October Term, 1954, in this Court). The *Schuman* case, *supra*, was criticized in footnote 4 of the opinion in the *White* case.—See page 26 of the petition for writ of certiorari; compare *Simon* v. *United States*, 9th Cir., No. 13,942, Dec. 17, 1954.

Applying the law of the Ninth Circuit, as clarified in these more recent opinions, it is plain from a reading of the record, the opinion of the court below and the petition in this case that there was no basis for the speculative finding by the court below that the local board disbelieved the petitioner. The memorandum states: "Board feels employment status such as to indicate remaining in I-Ao [sic] classification." (See footnote 3 of opinion below, page 24 of the petition.) The local board memorandum merely shows a belief that the performance of war work as a civilian disqualified the petitioner from claiming the conscientious objector status. It is not a finding that he was insincere. In *Clark* v. *United States*, No. 14,176, Dec. 3, 1954, and *Franks* v. *United States*, Oct. 4, 1954, 216 F. 2d 266, the court below held that performing war work as a civilian was no basis for denial of conscientious objector status when a registrant was classified I-A but that it was when a registrant was classified I-A-O by the board, as here in this *White* case.

The performance of civilian war work is no basis for finding a conscientious objector insincere. It necessarily follows that the court below was unjustified in speculating that the appeal board considered the memorandum of personal appearance, showing the local board's attitude toward White's work, as basis in fact for denial of the conscientious objector status in this case.

In any event the holding of the court below in this case is in direct conflict with *Williams* v. *United States*, 5th Cir., Oct. 29, 1954, 216 F. 2d 350, 351-352, where it was held that failure of the local board to indicate its disbelief of the registrant prevented the court from speculating a finding of insincerity.

A note in 102 University of Pennsylvania Law Review 694, 697 (March, 1954), condemns an "unexplained disbelief of the testimony" presented to the board and says that the doctrine of no basis in fact would "become an empty protection if satisfied by demeanor evidence."—See pages 33-34 of the Brief for Petitioner in *Simmons* v. *United States*, No. 251, October Term, 1954.

CONCLUSION

The law of the Ninth Circuit that demeanor evidence based on a religious belief of total neutrality and objection to all work under direction of the Government can be used as basis in fact for denial of the conscientious objector status will not be changed by a decision of the present conscientious objector cases before this Court. The holding that willingness to do civilian war work is basis in fact for a denial of the conscientious objector status when the registrant is classified in Class I-A-O (non-combatant soldier) but not when classified I-A (combatant soldier) will not be disposed of in the pending conscientious objector cases.

For these reasons it is suggested that the petition not be held up pending determination of those cases but be granted and the case be set down for argument and submission so that these questions, undetermined in the pending cases, will be settled.

Respectfully submitted,

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January, 1955.